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In the Supreme Court of the United States

OCTOBER TERM, 19[redacted]

INDIAN TOWING COMPANY, INC., ET AL., PETITIONERS

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 213

INDIAN TOWING COMPANY, INC., ET AL., PETITIONERS

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The order of the District Court dismissing the suit (R. 11) was entered without an opinion. The *per curiam* opinion of the Court of Appeals (R. 18–19) is reported at 211 F. 2d 886.

JURISDICTION

The judgment of the Court of Appeals was entered on April 22, 1954 (R. 19). The petition for a writ of certiorari was filed on July 15, 1954, and was granted on October 14, 1954 (R. 20). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether a claim may be maintained against the United States under the Federal Tort Claims Act for damage to a vessel's cargo resulting from the allegedly negligent failure of a lighthouse to operate.

STATUTES INVOLVED

1. The relevant provisions of the Federal Tort Claims Act[1] are as follows:

28 U. S. C. 1346 (b).

> Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circum-

[1] The Federal Tort Claims Act was enacted as Title IV of the Legislative Reorganization Act of 1946, 60 Stat. 842, 28 U. S. C. 921 *et seq.* While subsequently repealed, its provisions were reenacted into law, under the revision of the Judicial Code, as 28 U. S. C. 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671–2680, effective September 1, 1948 (62 Stat. 869, 992). Except for insignificant alterations in language, the portions of the Act relevant to the instant suit remained unchanged.

stances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * * *

28 U. S. C. 2674.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * * *

28 U. S. C. 2680.

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

2. 14 U. S. C. 81 provides:

Aids to navigation authorized

In order to aid navigation and to prevent disasters, collisions, and wrecks of

vessels and aircraft, the Coast Guard may establish, maintain, and operate:

(1) aids to maritime navigation required to serve the needs of the armed forces or of the commerce of the United States;

(2) aids to air navigation required to serve the needs of the armed forces of the United States as requested by the Secretary of the appropriate department within the National Military Establishment; and

(3) Loran stations (a) required to serve the needs of the armed forces of the United States; or (b) required to serve the needs of the maritime commerce of the United States; or (c) required to serve the needs of the air commerce of the United States as determined by the Administrator of Civil Aeronautics.

Such aids to navigation other than loran stations shall be established and operated only within the United States, its Territories and possessions, the Trust Territory of the Pacific Islands, and beyond the territorial jurisdiction of the United States at places where naval or military bases of the United States are or may be located, and at other places where such aids to navigation have been established prior to June 26, 1948.

STATEMENT

This action was brought against the United States under the Federal Tort Claims Act to recover damages for property loss sustained, allegedly as a result of negligence on the part of Coast Guard personnel in the maintenance of a lighthouse on Chandeleur Island, Louisiana.

The complaint (R. 2–6) alleged that petitioner Indian Towing Company, Inc., is the owner of the tug *Navajo*. On October 1, 1951, while towing the barge *AS 16*, which had been chartered by petitioner Upper Mississippi Towing Corporation, the *Navajo* went aground on Chandeleur Island. The grounding allegedly was due solely to the failure of the light on Chandeleur Island to function on that date, which failure, in turn, was due to the negligence of officers and enlisted personnel of the Coast Guard (R. 4–5).[2] This alleged negligence was said to consist of (1) the inadequate examination of the light by one Chief Petty Officer Stone on his inspection trip of September 7, 1951, when he failed to discover a loose connection, (2) the failure of the Coast Guard

[2] The Chandeleur Island lighthouse was "an unwatched light," *i. e.*, no Coast Guard personnel were assigned to man it. It was described as such in the Light List outstanding on October 1, 1951. See United States Coast Guard, Light List, *Atlantic and Gulf Coasts of the United States*, corrected to January 1, 1951 (C. G. 158), pp. 5, 498. This publication also advised mariners that, while unwatched lights have a high degree of reliability, they "may become irregular or extinguished." *Ibid.*, p. 5.

to inspect the light between September 7, 1951, and October 1, 1951, in order to determine whether it was operating properly, and (3) the failure of the Coast Guard to repair the light or to notify vessels that it was not operating. As a result of the grounding, sea water entered the cargo space of the barge *AS 16* which held 1,204.25 tons of triple superphosphate consigned to petitioner Minnesota Farm Bureau Service Company, and insured under a policy issued by petitioner United Fireman's Insurance Company (R. 3). The phosphate was completely wetted and allegedly was damaged in the amount of $62,659.70.

The complaint was filed in the United States District Court for the Southern District of Mississippi on August 8, 1952 (R. 2). On motion of the United States (R. 5–6), the cause was transferred on September 15, 1952, to the Eastern District of Louisiana, the district in which the alleged negligence took place and the district in which one of the petitioners (Indian Towing Company) resided (R. 7–8).

The United States, on December 1, 1952, moved to dismiss the complaint (R. 8–9). On June 29, 1953, the District Court dismissed the complaint, relying on *Dalehite* v. *United States*, 346 U. S. 15 (R. 11). On appeal, the Court of Appeals affirmed in a *per curiam* opinion, citing *Dalehite* v. *United States*, 346 U. S. 15, and *Feres* v. *United States*, 340 U. S. 135 (R. 18–19).

SUMMARY OF ARGUMENT

Petitioners' assertion is that the United States, through the Coast Guard, negligently failed to operate a warning light as an aid to navigation, and as a result the tug *Navajo* went aground. The claim must fail because it involves a uniquely governmental function and the Tort Claims Act does not permit suit on such claims.

I

The operation of lighthouses as aids to navigation has been an important activity of the Federal Government since 1789. Today, the establishment, maintenance, and operation of lighthouses and of similar aids are functions performed exclusively by the Coast Guard. Private persons are prohibited, under criminal penalty, from engaging in the activity (except for very limited private purposes, under Coast Guard permission and supervision).

II

The Tort Claims Act does not permit recovery for damages caused by inadequate performance of a governmental function such as the maintenance of a navigational light.

A. 1. The legislative history of the Act and its express provisions demonstrate a clear Congressional purpose to exclude from its coverage claims arising from the performance of charac-

teristically or uniquely governmental functions. The provisions of the Act indicate two branches to this exclusion, one based upon Sections 1346 (b) and 2674, Title 28, U. S. C., which limit the liability of the United States to that of a "private" person in "like circumstances", and the other, based upon Section 2680 (a), which excepts claims arising from the performance of a "discretionary function." Though not mutually exclusive, each branch gives content to the exclusion and protects the United States from claims affecting activities primarily governmental in nature.

The first branch, based on Section 2674, bars claims arising from the misfunctioning of a governmental activity itself, *i. e.* failure to obtain the objective of the particular public activity in which the plaintiff is interested. Thus, if the Federal Bureau of Investigation or the police fail to prevent a bank robbery or if the Coast Guard or a fire department fail to extinguish a fire, no private cause of action accrues. Since these functions are unlike any carried on by a private person, there can be no parallel liability of a "private individual under like circumstances"; such liability has no analogy in the general common law of torts. And this Court has repeatedly emphasized that the Tort Claims Act permits suit only on "recognized causes of action" and does not "visit the Government with novel and unprecedented liabilities." *Feres* v. *United States*, 340

U. S. 135, 142; *Dalehite* v. *United States*, 346 U. S. 15, 43; *United States* v. *Brown*, Oct. T. 1954, No. 38, slip op., p. 3.

The second branch of the governmental-function exclusion, based on the "discretionary function" exception of Section 2680 (a), bars claims founded on regulatory or discretionary activities. But the exception is not limited to administrative decisions. It also takes meaning from the body of case law involving suits against cities and states for the negligent performance of governmental activities, which regularly hold that such negligence is not actionable.

2. The *Dalehite* case applied both branches of the governmental-function exclusion. Section 2680 (a) was held to govern the fertilizer phase of the case. That portion of the opinion which dealt with the asserted negligence of the Coast Guard in its firefighting and other public duties rests on Section 2674, and held that suit cannot be brought for malfunctioning of governmental activities closely comparable to that involved here. Other cases under the Tort Claims Act are in accord.

B. 1. In seeking to impose liability on the United States for its failure to operate the lighthouse efficiently, petitioners can point to no analogous private liability in like circumstances. Private persons do not engage in this kind of activity. Perhaps the closest analogy is the function of cities and states in their activities de-

signed to protect life and property of the community at large, particularly in connection with traffic on the highways. But it has long been established that these governments are not liable for negligence in such undertakings, and for the very reason that the functions are uniquely governmental. While a statute could change the rule, legislative purpose to do so must be expressed explicitly. In enacting the Tort Claims Act, it was the aim of Congress to retain this rule, and not to create a liability involving a potentially enormous financial burden.

2. In another aspect, the obligation of a government to protect life and property is one which is owed to the community as a whole, rather than to particular members of the public. Breach of that public duty does not create a private cause of action. Nor can liability for misfunctioning of a governmental activity be imposed on a principle akin to the Good Samaritan doctrine. Since all governmental activities are undertaken voluntarily with the expectation that the public will rely upon them, application of this doctrine would effectively wipe out the exclusion of governmental functions, contrary to the legislative purpose.

ARGUMENT

Petitioners sue the United States under the Tort Claims Act for the allegedly negligent failure of a Coast Guard navigation light, leading to the grounding of the tug *Navajo*. From the

country's beginning, the Federal Government has maintained such aids to navigation as an integral part of its public responsibility to promote the general safety of commerce. The Tort Claims Act was not designed to subject the United States to pecuniary liability for failure to fulfill this type of governmental duty. The keeping of lighthouses—like weather forecasting, police work, and fire-fighting—falls into the class of uniquely public or governmental activity, without private counterpart, which has never been subjected to liability under American law and which this Act does not reach.

I

AIDS TO MARINE NAVIGATION ARE MAINTAINED AND CONTROLLED BY THE COAST GUARD AS PART OF ITS GOVERNMENTAL RESPONSIBILITY

1. The maintenance of aids to marine navigation was one of the initial activities undertaken by the Federal Government. It was recognized at the very outset of the first session of Congress that the erection and maintenance of lighthouses and other navigation aids are properly functions of the Federal Government. By the Act of August 7, 1789, 1 Stat. 53, it was stipulated that the public treasury was to assume the expense of maintaining and repairing all existing lighthouses, beacons, and buoys, provided they were ceded to the United States within a period of one

year. The same Act directed the Secretary of the Treasury to provide for the building of a lighthouse in the entrance to the Chesapeake Bay, as well as for the manning and repairing of the ceded facilities. See, also, Act of May 15, 1820, 3 Stat. 598.

Twelve lighthouses which had previously been built by the colonies were immediately turned over to the Government and became the nucleus of a continuously expanding system of aids to marine navigation,[3] a system which on June 30, 1953, included 38,169 Government owned and operated aids.[4] In the beginning, the administration of the system was directly supervised by the Secretary of the Treasury; as his duties increased, this responsibility was delegated to subordinate officials. In 1852, a Lighthouse Board was created, consisting of officers in the Army and Navy and of civilian scientists. In 1903, the Board was transferred from the Treasury Department to the newly-created Department of Commerce and Labor,[5] and, in 1910, it was superseded by the Bureau of Lighthouses in the Department of Commerce. On July 1, 1939, the

[3] Except as otherwise noted, this historical summary is derived from U. S. Coast Guard, *Aids to Marine Navigation of the United States* (C. G. 193, 1949) pp. 28–29.

[4] U. S. Coast Guard, *Aids to Navigation Operated and Maintained by the United States and Coast Guard* (June 30, 1953) p. 1.

[5] Act of February 14, 1903, c. 552, § 4, 32 Stat. 825, 826.

Lighthouse Service was consolidated with the Coast Guard.[6]

2. In maintaining the lighthouse on Chandeleur Island and approximately thirty-eight thousand other federally established aids, the Coast Guard performs the general public duty outlined in 14 U. S. C. 81 (*supra*, pp. 3–4), which provides in relevant part that "[i]n order to aid navigation and to prevent disasters, collisions and wrecks of vessels * * * the Coast Guard *may* establish, maintain and operate: (1) aids to maritime navigation required to serve the needs of the armed forces or of the commerce of the United States." And these federally maintained aids, which range from lightships to unlighted buoys, represent the overwhelming majority (90%) of the total number of aids which are to be found on the navigable waters of the United States, its territories, and possessions. Moreover, the Coast Guard has an absolute monopoly as to some type of aids. For example, it operates all of the 398 light stations (*i. e.* a lighted aid on a fixed structure to which personnel are assigned for the purpose of watching the light).[7]

In addition to the maintenance of more than 90% of all navigational aids on the navigable waters of the United States, the Coast Guard

[6] Reorganization Plan No. II, effective July 1, 1939, § 2 (a), 53 Stat. 1432.

[7] *Op. cit. supra*, fn. 4 at p. 1.

exercises direct and close supervision over the roughly 3,300 so-called "private" aids to navigation. These private aids are erected and serviced by municipal, state, or federal agencies, or by private industry, but only after the approval of the Coast Guard has been obtained.[8] They generally take the form of either unlighted buoys, day beacons, or lights upon fixed structures such as bridges,[9] and their construction is sanctioned

[8] Congress has made it a criminal offense for any "person, or public body, or instrumentality, excluding the armed services," to "establish, erect, or maintain any aid to maritime navigation without first obtaining authority to do so from the Coast Guard in accordance with applicable regulations" (14 U. S. C. 83). This prohibition has existed for almost fifty years. See Act of June 20, 1906, 34 Stat. 321, 324. It is also a criminal offense for any person to interfere with an aid to navigation (14 U. S. C. 84). Pursuant to these sections, and 14 U. S. C. 92, which confers upon the Secretary of the Treasury broad powers in regard to carrying out the functions delegated to the Coast Guard, regulations have been promulgated governing the establishment and maintenance of private aids. These regulations cover such matters as the application procedure, the required characteristics of the private aid, inspection by the Coast Guard, and the circumstances in which a private aid must be removed. See 33 C. F. R. (1949 ed.) §§ 66.01–1—66.01–35. Private aids lawfully maintained receive the same protection against interference or obstruction as is afforded by law to Coast Guard aids to navigation. See 14 U. S. C. 84; 33 C. F. R. (1949 ed.) §§ 66.01–50, 70.01–1.

[9] Of the 3301 private aids in operation on June 30, 1953, 3073 fell into one of these categories. The balance were lighted buoys, fog signals, and shore-based radar stations. *Op. cit. supra*, fn. 4 at p. 12. There are no statistics available which reflect the proportion of the private aids which are maintained by governmental units as opposed to individuals or corporations.

where it has been administratively determined (1) that the aid is to be used *exclusively by the agency or private person* and will *not* serve general navigation, the interest which the Coast Guard is charged to protect,[10] or (2) if the aid is to be placed on a fixed structure, that the owner of the structure is legally obligated to do so.[11]

3. This summary of history and present practice reveals the unique connection between the Coast Guard and the maintenance of lighthouses and other aids to public navigation. It is the Coast Guard's special mission to establish, service, and operate these aids. Private participation

[10] The Coast Guard in its manual on aids to navigation gives these examples of typical aids considered in the category of private aids [U. S. Coast Guard, *Aids to Navigation* (C. G. 127, 1945) p. 1201]:

(1) Standard buoy and lighting equipment employed by the United States Engineers to mark dredging areas.

(2) Buoys, ranges and sound signals in channels dredged by private corporations to their property, which channels are used exclusively by the corporation's, or its contractor's, vessels.

(3) Aids established by the Army and Navy for their own use in connection with the approaches to loading piers, etc.

See also, U. S. Coast Guard, *Aids to Navigation Manual* (CG–222, Jan. 1953), pp. 4–1, 4–3.

[11] Coast Guard regulations require all persons owning, occupying, or operating bridges over the navigable waters of the United States to maintain at their own expense such lights required for the safety of marine navigation as may be prescribed by the Commandant. 33 C. F. R. (1949 ed.) § 68.01–1. In addition, there is a non-delegable duty imposed upon the owner of a sunken wreck to mark it. 33 U. S. C. 409; 33 C. F. R. (1949 ed.) 64.01–1.

is minimal. The activity is not one which the Government carries on along with private persons; there is no private parallel with the public job of keeping the lights.

II

CLAIMS AGAINST THE UNITED STATES BASED UPON THE PERFORMANCE OF A GOVERNMENTAL FUNCTION WITHOUT PRIVATE COUNTERPART, SUCH AS THE MAINTENANCE BY THE COAST GUARD OF A NAVIGATIONAL LIGHT, ARE EXCLUDED FROM THE COVERAGE OF THE TORT CLAIMS ACT

It would impose a liability novel and unprecedented in American law to hold a government answerable for the negligent performance of, or the failure to fulfill, a uniquely governmental or public responsibility like the maintenance of a lighthouse. Enacted as a conservative remedy for the injustice and inconvenience flowing from the Government's immunity from liability for common-law torts, the Tort Claims Act did not reach into such new and uncharted fields. The key to the Act's limited purpose, as well as its coverage, is found in Sections 2674 and 1346 (b) of Title 28 which emphasize that the only liability assumed by the United States is that which a "private individual" or "private person" would have "under like circumstances". Together with the "discretionary function" exception of Section 2680 (a), those provisions preclude recovery when, as here, the claim is one which, because of the characteristically governmental factors involved, cannot rightly be equated to a suit of one

private individual against another. *Feres* v. *United States*, 340 U. S. 135, 141–142; *Dalehite* v. *United States*, 346 U. S. 15, 28, 32, 43–44.

A. THE ACT COVERS ONLY "PRIVATE" TORTS

1. *The limiting provisions of the Act.*—As this Court clearly recognized in *Dalehite* v. *United States*, 346 U. S. 15, although the Tort Claims Act constitutes a broad waiver of the Government's immunity from suit, the waiver is far from unlimited. The sponsors and the draftsmen of the legislation, in explaining some of the limitations, stated that since permitting suit against the sovereign for tort would be "a radical innovation," it was wise to proceed cautiously;[12] certain torts regarded as difficult to defend, and claims based on governmental activities which "should be free from the restraint of damage suits," were deliberately excluded from coverage.[13] It was recognized in Congress that because of these restrictions there would still be occasion for the private bill remedy—in instances of hardship or moral obligation or in other equitable situations where the terms of the statute barred recovery.[14]

[12] Hearings before Subcommittee No. 1 of the Committee on the Judiciary, H. of Reps., 76th Cong., 3d Sess., on H. R. 7236, p. 22.

[13] *Ibid.*; Memorandum for the Use of the Committee on the Judiciary, 77th Cong., 2d Sess., Explanatory of Committee Print of H. R. 5373, p. 8.

[14] See, *e. g.*, Hearings before a Subcommittee of the Committee on the Judiciary, U. S. Sen., 76th Cong., 3d Sess., on S. 2690, pp. 34, 38, 39, 52–53; Hearings before Subcommittee

And this Court has declared that just as the waiver of immunity must be given a construction which will accomplish its aim, so, too, the Act must be interpreted with "due regard for the statutory exceptions" and for "such restrictions as have been imposed" upon the right to sue. *Dalehite* v. *United States*, 346 U. S. 15, 31.[15]

a. One of the basic limitations upon the coverage of the statute is the exclusion of claims arising from the performance of acts of a dominantly governmental nature. "The legislative history indicates," this Court said after extensively reviewing that history, "that * * * it was not contemplated that the Government should be subject to liability for acts of a governmental nature or function." *Dalehite, supra*, 346 U. S. at pp. 27–28. "* * * Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions." *Ibid.*, at 32.

This conclusion is supported by the legislative hearings, reports and debates.[16] The Tort Claims Act was enacted in 1946 as Title IV of the Legis-

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No. 1, of the Committee on the Judiciary, H. of Reps., 76th Cong., 3d Sess. on H. R. 7236, pp. 15, 22.

[15] In addition to the exceptions and conditions discussed in the text, Section 2680 excludes claims arising in a foreign country, claims flowing from combatant activities of the military forces in war time, claims arising from specific torts such as assault, battery, false arrest, libel, etc.

[16] For a more detailed survey of the history, see the Brief for the United States in *Dalehite*, Oct. Term 1952, No. 308, pp. 179 *ff.*

lative Reorganization Act, 60 Stat. 842, the culmination of "some twenty-eight years of congressional drafting and redrafting, amendment and counter-amendment." *United States* v. *Seplar*, 338 U. S. 217, 219–220. Throughout this period, as noted in *Dalehite*, 346 U. S. at 28, the prime legislative effort was to make the United States amenable for the "ordinary common law torts" such as are involved in automobile accidents, and that purpose was expressly reaffirmed when the Act was passed.[17] During this same time it was the consistent view of Congress that the important governmental functions should be protected and that suit should not be permitted, as stated by a member of the House Committee on the Judiciary, on "that class of tort on the part of the Government which has to do with a governmental function, so to speak."[18]

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[17] See *e. g.*, 67 Cong. Rec. 11092, 11100; 69 Cong. Rec. 2192, 3118; Hearings before a Subcommittee of the House Committee on Claims, 72d Cong., 1st Sess., on a general tort bill (Feb. 1932), p. 17; Hearings on H. R. 7236, 76th Cong., 3d Sess. (April 1940), p. 16; Hearings on S. 2690, 76th Cong., 3d Sess. (March 1940), pp. 27–8; Hearings on H. R. 5373 and H. R. 6463, 77th Cong., 2d Sess. (Jan. 29, 1942), pp. 28, 37, 39, 66; H. Rept. No. 2428, 76th Cong., p. 3; H. Rept. No. 2245, 77th Cong., p. 10; H. Rept. No. 1287, 79th Cong., p. 5; S. Rep. No. 1400, 79th Cong., p. 31.

[18] Representative Gwynne speaking on H. R. 7236, 76th Cong. (86 Cong. Rec. 12021). See also 67 Cong. Rec. 11086–11100; 69 Cong. Rec. 2191, 2196, 3117, 3127; H. Rept. No. 2800, 71st Cong., p. 9; 86 Cong. Rec. 12021–2; Hearings on H. R. 5373 and H. R. 6463, 77th Cong. (Jan. 1942), pp. 28.

b. This purpose was carried out through the vehicle of three Sections of the Act: 28 U. S. C. 1346 (b), 2674, and 2680 (a). Section 1346 (b) provides that the United States shall be liable for the negligent or wrongful acts of its employees[19] "under circumstances where the United States, *if a private person*, would be liable to the claimant." Section 2674 emphasizes that the United States assumes liability only "in the same manner and to the same extent *as a private individual under like circumstances*" (emphasis added). And Section 2680 (a) excludes claims based upon the exercise of a discretionary function or duty.

These provisions indicate two overlapping but independent branches to the governmental-function exclusion: the one, marked out by Sections 2674 and 1346 (b), bars recovery when the claim is one which, when viewed in all its circum-

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33, 38, 45, 65, 66; S. Rept. No. 1196, 77th Cong., p. 7; H. Rept. No. 2245, 77th Cong., p. 10; H. Rept. No. 1287, 79th Cong., p. 5.

[19] It may be noted, in passing, that liability is conditioned upon a negligent or wrongful act or omission of a government employee while acting within the scope of his employment. 28 U. S. C. 1346 (b). The United States, therefore, may not be held liable for the negligence of its employees occurring while they are on a frolic of their own (*King* v. *United States*, 178 F. 2d 320 (C. A. 5), certiorari denied, 339 U. S. 964); nor, on the theory of absolute liability, for engaging in an extrahazardous activity (*Dalehite* v. *United States*, 346 U. S. 15, 45).

stances,[20] cannot be equated to a demand which one private individual can properly make against another; the second branch, in Section 2680 (a), bars recovery for conduct traditionally characterized as discretionary or regulatory even though there may be a private counterpart.

Included in the first class (the class primarily involved here), are those claims (a) which arise from an activity or relationship which is characteristically or uniquely governmental, and (b) where the essence of the claim is the negligent or wrongful performance, or the failure to perform, the activity *itself*. By characteristically or uniquely governmental, we mean those activities which now are, and historically have been, regarded as the special function or aim of government, as distinct from activities parallel to those carried on by private persons or groups, thus, the regulation or licensing of business, professional, or commercial activities; the prevention and fighting of fire; the apprehension of criminals and the furnishing of police protection; weather forecasting; traffic control; safety and sanitary inspections.

It is not, of course, all official conduct furthering in some way these governmental ends which is excluded from coverage; we are not seeking to establish for the Tort Act the "governmental"-

[20] The liability assumed by the Government is that created by *all* the circumstances, not those which a few of the circumstances might create. *Feres* v. *United States*, 340 U. S. 135, 142; *Dalehite* v. *United States*, 346 U. S. 15, 43.

"proprietary" classification of *general spheres of activity* which has grown up in American municipal law.[21] On our view, the plaintiff would be barred from suit, not in the routine case of collision with a truck carrying the Weather Bureau's mail, but only where his interest lies in attaining the end-objective of the particular government activity (*e. g.*, proper weather reports) and where the charged wrongful conduct (*e. g.*, negligence on the part of the forecasters) causes the government to fail in fulfilling that particular function, to the plaintiff's detriment. In such cases, the plaintiff's loss is asserted to be directly due to the government's failure to attain the governmental objective—proper regulation, or fire-fighting, or police protection, or weather forecasting, etc.

Compare the situation in which a governmental vehicle negligently strikes a pedestrian; there, the gravamen of the complaint would not be that the particular agency failed to fulfill its specific statutory function. So far as that complainant would be concerned, whether or not the agency (*e. g.*, the Weather Bureau) attained its objective would be totally irrelevant to his claim.

[21] We emphasize again, as we did in *Dalehite* (Brief for the United States, Oct. Term, 1952, No. 308, pp. 189, 192 (fn.), 193), that it is *not* our position that every activity (including the driving of cars) connected in some way with a "governmental" function is immune under the Act. As the text points out, only certain particular conduct within the general sphere of activity is excluded. See *infra*, pp. 37 (fn. 35), 40.

He is interested only in the careful performance of the intermediate step of driving a truck. The Tort Claims Act was intended to permit such a suit, but not a case where the very gist of the claim is the negligent failure-to-function of the governmental activity itself.[22]

Where the claim is of this nature, it may be unnecessary to look beyond Section 2674 to find that recovery is barred, even though the challenged conduct also may be within the classical meaning of the words "discretionary function" as used in Section 2680 (a).[23] Regardless of whether "discretion" is involved, the determinative factor is the characteristically governmental nature of the activity which itself, through its alleged failure to function so as to attain its aim, directly caused the damage.[24] The negligence of

[22] The same distinction was made in the Committee Reports explaining the Section 2680 (a) exception. It was stated that while the Act was intended to permit suit for claims arising from a collision with a regulatory agency's vehicle, it was not intended to cover claims based upon the regulatory activities of the agency. See Reports cited in *Dalehite*, 346 U.S. at fn. 21, pp. 29-30.

[23] See *infra*, fn. 25, p. 26.

[24] It is significant that the language of what is now Section 2674 had appeared in proposed bills before the discretionary function language of Section 2680 (a) was injected (e. g., S. 2690, Sec. 201, 76th Cong., 1st Sess.; H. R. 5299, Sec. 201, 77th Cong., 1st Sess.), and it was believed that even without the 2680 (a) exception claims falling under it would have been barred. Hearings before the Committee on the Judiciary, H. of Reps., 77th Cong., 2d Sess., on H. R. 5373 and H. R. 6463, pp. 29, 35; Memorandum for the Use of the

Army personnel in failing to protect a citizen, the carelessness of FBI agents in failing to prevent a bank robbery, the negligence of the Coast Guard in extinguishing a fire, would not create actionable private rights. In each instance the claim for damages would be based upon the failure of the Government properly to perform certain special or unique functions of government. Since these functions are unlike any carried on by a private individual, there can be no analogous private liability "under like circumstances" and the claims would be barred by Sections 2674 and 1346 (b). Cf. *Feres* v. *United States*, 340 U. S.

Committee on the Judiciary, H. of Reps., 77th Cong., 2d Sess., Explanatory of Committee Print of H. R. 5373, p. 29. The remarks of Representative Gwynne quoted above (p. 19), that the purpose was to exclude claims relating to governmental functions, were made in connection with a bill (H. R. 7236, 76th Cong.) which contained the present Section 2674 language but not that of Section 2680 (a). Commenting with reference to the Section 2674 language in such an earlier bill, a Department of Justice representative said, "* * * [T]his section waives the Government's immunity to suit, and places the Government in the same position as regards liability for these claims as a *private* individual or corporation would be when it is sued." Hearings before a Subcommittee of the Com. on the Jud., U. S. Sen., 76th Cong., 3d Sess., on S. 2690, p. 37. "The bill is, of course, limited to those tort claims which the law would recognize as justiciable, and for which a recovery could be had in the event that the defendant were a *private* individual or a *private* corporation, as the bill merely waives the immunity of the United States against being sued." *Ibid.*, p. 34; and see *id.*, p. 51. (Emphasis added.) Compare, *Turner* v. *United States*, 248 U. S. 354, 358 (*infra*, p. 55).

135, 141–142; *Dalehite* v. *United States*, 346 U. S. 15, 43–44. On three different occasions, this Court has emphasized that the effect of the Act "is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities." *Feres, supra; Dalehite, supra; United States* v. *Brown*, Oct. T. 1954, No. 38, slip op., 3 (Dec. 6, 1954). The Act permits recovery only where there is "an established type of liability" (cf. *United States* v. *Gilman*, 347 U. S. 507, 509). As we show more fully below (*infra*, pp. 40 *ff.*), that type of liability does not exist in American law when a government fails in fulfilling its uniquely public responsibilities.

c. Section 2680 (a), on the other hand, excludes claims based upon the exercise of a discretionary function or duty even though the activities involved are comparable to those carried on by a private person. It avoids the possibility of testing the validity of legislation or regulations through the device of a suit for damages for tort, and it excludes suits based upon administrative action of a regulatory nature or relating to the execution of a Federal project, and the like. *Dalehite*, 346 U. S. at 27. The words "discretionary function" mean a product of official "policy judgment and decision" or "the discretion of the executive or the administrator to

act according to one's judgment of the best course" (*ibid.*, at 36, 34).[25]

As noted above, some claims fall readily under the bar of Section 2674 (*e. g.*, one based upon the Coast Guard's dereliction in its public fire-fight-

[25] The concept expressed by the words "discretionary function" also encompasses the carrying out of a uniquely governmental activity such as the promulgation or enforcement of law (*Dalehite*, 346 U. S. at 43). The words have a "substantial historical ancestry in American law" (*ibid.*, at 34; *Coates* v. *United States*, 181 F. 2d 816, 818 (C. A. 8)). Their meaning was developed through the years in cases involving (a) mandamus or injunction actions to compel the performance of discretionary duties (*e. g.*, *Louisiana* v. *McAdoo*, 234 U. S. 627, 633), (b) damage suits against public officials for carrying out official discretionary duties (*e. g.*, *Spalding* v. *Vilas*, 161 U. S. 483, 498–499), and (c) suits against municipalities and states for injuries resulting from the performance of certain governmental or discretionary functions (*e. g.*, *Johnston* v. *District of Columbia*, 118 U. S. 19, 21; *Barrett* v. *State of New York*, 220 N. Y. 423; *Steitz* v. *City of Beacon*, 295 N. Y. 51). The controlling principle to be drawn from these three bodies of law is that it is not the place of the courts either to revise, supervise or control executive conduct involving the exercise of judgment or discretion of a public character, or to review the manner in which functions of government are carried out. While the first two categories are, to a large extent, comprised of cases involving discretionary administrative acts of regulatory authorities, the last goes well beyond, for it also involves claims arising from activities which, while not necessarily regulatory, are nevertheless uniquely governmental. And there, in barring recovery, the courts simply point out that the activity is "governmental" or "discretionary", using the words interchangeably. (See generally the cases cited below, p. 40 *et seq.*) It is primarily in this third category that the discretionary function language of Section 2680 (a) may coincide with and exclude the same type of claim as does Section 2674.

ing duties), without regard to the question of administrative discretion. They are based upon the failure of a uniquely governmental activity to function properly, and cannot be analogized to circumstances giving rise to private liability. Other claims may fall wholly within Section 2680 (a), as in the case of a claim based upon the manner in which Federal funds are expended. Still others, however, may come within the bar of both sections, for example, a claim based upon negligence of the Civil Aeronautics Board in promulgating an inadequate airplane inspection regulation. Such a claim would be excluded by Section 2680 (a) because it arises from an administrative discretionary act. In addition, the regulation of aircraft and air carriers is a uniquely governmental function without any private counterpart (see 49 U. S. C. 401 *et seq.*), and the claim would also be precluded by failure to meet the requirements of Section 2674. Thus, the two branches of the governmental-function exclusion complement as well as overlap each other, both insuring protection against claims affecting purely governmental activities.

2. *The decisions under the Act.*—a: The ruling in *Dalehite* v. *United States*, 346 U. S. 15, crystallizes and applies both aspects of the governmental-function exclusion. Petitioners' contention that the court below misconceived *Dalehite* and that "the whole basis" of the *Dalehite* decision was "wrongful discretionary administrative

action" (Pet. Br. 5–7) stems from their failure to perceive the two facets of the "governmental" exception.

It will be recalled that in *Dalehite*,[26] apart from the asserted carelessness in the adoption of the fertilizer program as a whole, the trial court's findings of negligence related, first, to alleged negligence in the manufacture, bagging, and shipment of a dangerous product (346 U. S. at 23, 37–42, 46–47), and second, to the alleged negligence of the Coast Guard in failing properly to carry out its duties of policing the shipboard loading of the dangerous substance and of discovering and extinguishing the fire (346 U. S. at 23–24, 42–43).[27] The *Dalehite* opinion considered each type of alleged negligence separately.

As to the alleged negligent manufacture, packaging, and shipment of FGAN, the Court was dealing with activities each of which had a private counterpart. Accordingly, the test of Section 2674

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[26] *Dalehite* was a test case involving personal and property claims resulting from the disastrous explosion at Texas City, Tex., of fertilizer grade ammonium nitrate (FGAN). The FGAN had been produced for the United States pursuant to a program designed to increase the food supply of devastated areas in occupied enemy territories following World War II. The United States undertook the program to meet its obligation as an occupying power and to dispel the dangers of internal unrest. 346 U. S. at 17, 19.

[27] The district court's Findings of Fact in *Dalehite* appear in Vol. 2, pp. 882 *et seq.*, 900, 831 *et seq.*, of the printed record filed in this Court, October T. 1952, No. 308. The court found the Coast Guard negligent in failing to enforce com-

was met in this phase of the case. Where, however, the activity giving rise to the claim is one in which private persons normally engage, it may become necessary to inquire whether the negligent acts were discretionary within the meaning of Section 2680 (a). This Court made that inquiry in *Dalehite* and concluded that although the employees at the operational level did not themselves exercise any discretion or independent judgment in the manufacture, bagging, and shipment of the fertilizer, each of their acts held to have been negligent was specifically directed by a plan (346 U. S. 38–39), which plan was itself the product of policy judgment and the exercise of discretion by their superiors (346 U. S. 35–36). This brought the discretionary function exception into play: the non-discretionary "acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of § 2680 (a) would fail at the time it would be needed" (346 U. S. 36).[28]

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pliance with existing Army, Coast Guard and ICC safety regulations, and in failing to promulgate other appropriate regulations. It found also that the Coast Guard had been negligent in failing to discover the fire promptly on the vessels, in failing to remove the vessels from the harbor after the fire was discovered, and in failing to extinguish and prevent the spread of the fires in Texas City.

[28] This Court did not restrict the discretionary function exception merely to high level policy judgment and deny it to discretionary acts at the operational level. On the contrary, the Court observed that the language of Section 2680

Unlike the FGAN aspect of the case, the alleged derelictions of the Coast Guard presented the Court with claims based upon the manner in which characteristically governmental activities were performed—activities which had no private parallel and which could not be analogized to a situation predicating private liability in like circumstances. It was therefore unnecessary to consider whether or not "discretion" had been exercised. The Court refused even to consider the specific findings of Coast Guard negligence (346 U. S. at 41–44). Applying the Section 2674 branch of the governmental-function exclusion, the Court said (346 U. S. at 42–44):

(a) covers "Not only agencies of government * * * but *all* employees exercising discretion" (346 U. S. at 33, emphasis ours) and went on to say, "It is unnecessary to define, apart from this case, precisely where discretion ends" (346 U. S. at 35).

Illustrative of other cases barring claims stemming from discretionary administrative action are *Schmidt* v. *United States*, 198 F. 2d 32 (C. A. 7), certiorari denied, 344 U. S. 896 (SEC investigation); *Matveychuk* v. *United States*, 195 F. 2d 613 (C. A. 2), certiorari denied, 344 U. S. 845 (OPA denial of rent increase); *Chournos* v. *United States*, 193 F. 2d 321 (C. A. 10), certiorari denied, 343 U. S. 977 (failure to grant grazing permit); *Smart* v. *United States*, 207 F. 2d 841 (C. A. 10) (release of a mental patient from a Government hospital). Some of these claims would also be barred by Section 2674, as having no private analogy. As to the exclusion of suit for negligence in policies and plans for authorized governmental activities which have analogous private counterparts see also cases discussed in *Dalehite*, 346 U. S. at fn. 32, pp. 36–37. And see, *Harris* v. *United States*, 205 F. 2d 765 (C. A. 10) (damage from airplane spraying while eradicating mosquitoes).

The findings of negligence on the part of the Coast Guard in failing to supervise the storage of the FGAN, and in fighting the fire after it started, were rejected by a majority of the Court of Appeals. 197 F. 2d, at 777, 780, 781. We do not enter into an examination of these factual findings. We prefer, again, to rest our decision on the Act.

* * * * *

As to the alleged failure in fighting the fire, we think this too without the Act. The Act did not create new causes of action where none existed before.

> "* * * the liability assumed by the Government here is that created by 'all the circumstances', not that which a few of the circumstances might create. We find no parallel liability before, and we think no new one has been created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities." *Feres* v. *United States*, 340 U. S. 135, 142.

It did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. Our analysis of the question is determined by what was said in the *Feres* case. See 28 U. S. C. §§ 1346 and 2674. The Act, as was there stated, limited United States liability to "the same man-

ner and to the same extent as a private individual under like circumstances." 28 U. S. C. § 2674. Here, as there, there is no analogous liability; in fact, if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire. This case, then, is much stronger than *Feres*. We pointed out only one state decision which denied government liability for injuries incident to service to one in the state militia. That cities, by maintaining fire-fighting organizations, assume no liability for personal injuries resulting from their lapses is much more securely entrenched. The Act, since it relates to claims to which there is no analogy in general tort law, did not adopt a different rule. See *Steitz* v. *City of Beacon*, 295 N. Y. 51, 64 N. E. 2d 704. To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease.[29]

[29] While the dissenting Justices were of the view that plaintiffs were entitled to recovery, they did not take issue with the majority of the Court as to the Coast Guard aspect of the case. All had joined in the opinion in the *Feres* case on which the majority relied in holding that the Coast Guard was immune from liability under the Tort Claims Act (340 U. S. at 43–44); indeed, the *Feres* opinion was written by Mr. Justice Jackson, the author of the dissent in *Dalehite*. Instead, the dissenting Justices found that the circumstances surrounding the manufacture and shipping of the FGAN

In *Feres*, dealing with negligently caused injuries to soldiers on active duty, the Court had previously pointed out the absence of a private law analogy in resting its decision against coverage on the unique relationship between the

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afforded a basis for imposing liability. And, in doing so, they laid emphasis on the fact that activity of this nature has a private counterpart. "The Government, as landowner, as manufacturer, as shipper, as warehouseman, as shipowner and operator, is carrying on activities indistinguishable from those performed by private persons. * * * The Government's negligence here was not in policy decisions of a regulatory or governmental nature, but involved actions akin to those of a private manufacturer, contractor, or shipper" (346 U. S. at 60).

It should be observed, also, that of the three Circuit Judges who heard the instant case in the court below (Hutcheson, Ch. J., Borah and Holmes, J. J.), the first two had filed the dissenting opinion in the *Dalehite* case when it was before the Court of Appeals for the Fifth Circuit sitting *en banc*. 197 F. 2d 771, 782. In holding that the United States could not be liable under the Tort Claims Act for negligence in these public activities of the Coast Guard, the majority opinion had declared in *Dalehite* that, "There are no functions of private individuals comparable to those with which the Coast Guard is charged by statute," and had pointed to the language of Sections 1346 (b) and 2674 as well as to the *Feres* decision to demonstrate that, as a prerequisite to imposing liability on the United States, the claimants must show analogous private liability in like circumstances. 197 F. 2d 780. The dissenters there, like the Justices who dissented in this Court, did not express disagreement on this aspect of the case. They, too, would have contemplated liability, not on the basis of the defalcation of the Coast Guard in connection with uniquely governmental duties, but on the ground that the United States, as a manufacturer of a dangerous product, should be held liable just as a private manufacturer would be. 197 F. 2d at 786.

claimants and the United States.[30] Illustrative lower court cases barring liability on the ground that there was no comparable private liability are *National Mfg. Co.* v. *United States*, 210 F. 2d 263 (C. A. 8), certiorari denied, 347 U. S. 967 (claims based upon the negligent calculation of a weather report issued by the U. S. Weather Bureau);[31] *Sigmon* v. *United States*, 110 F. Supp. 906, 910 (W. D. Va.) (action by a federal prisoner for injuries sustained in prison);[32] cf. *P. Dougherty Co.* v. *United States*, 207 F. 2d 626 (C. A. 3), certiorari denied, 347 U. S. 912 (suit

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[30] The Court said (340 U. S. at 141):

> * * * One obvious shortcoming in these claims is that plaintiffs can point to no liability of a "private individual" even remotely analogous to that which they are asserting against the United States. We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving. Nor is there any liability "under like circumstances," for no private individual has power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons of command.

[31] "If the activity is purely governmental there can be no liability under the Act * * *. * * * The [weather] service is plainly of a governmental nature or function intended for the public at large and wholly for governmental purposes. It is disassociated from any private business counterpart * * *." 210 F. 2d at 277.

[32] "A private individual would never find himself 'under like circumstances' to those alleged in the complaint, because no private individual has the legal right to hold any other private individual in penal servitude." 110 F. Supp. a. 910.

under the Public Vessels Act for alleged negligence by Coast Guard in rescue operations).

b. In their brief, petitioners avoid any discussion of the "no analogous private liability" phase of the *Dalehite* opinion. Nor do they make any mention of the test of Section 2674. Instead, they argue only that their claim is not within the bar of Section 2680 (a). To sustain their view they refer to a number of cases in lower federal courts, all decided prior to *Dalehite*, and contend that it is unreasonable to assume that this Court disapproved those cases in *Dalehite* without specifically mentioning them. Of these cases, *Somerset Seafood Co.* v. *United States*, 193 F. 2d 631 (C. A. 4), and *Mid-Central Fish Co.* v. *United States*, 112 F. Supp. 792 (W. D. Mo.) are the only ones which can possibly be said to support petitioners.[33]

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[33] *Wickman* v. *Inland Waterways Corp.*, 78 F. Supp. 284 (D. Minn.), dealt with the proposition that the Federal Tort Claims Act provided an exclusive remedy for allegedly tortious acts of employees of the Inland Waterways Corporation. *Lacey* v. *United States*, 98 F. Supp. 219 (D. Mass.), held that the United States was not liable for failure of the Coast Guard to effectuate a rescue. *State of Maryland, for Use of Pumphrey* v. *Manor Real Estate and Trust Co.*, 176 F. 2d 114 (C. A. 4), held that a real estate company there involved was an agent or employee of the United States and not an independent contractor. *Hernandez* v. *United States*, 112 F. Supp. 369 (D. Hawaii), involved a situation where analogous private liability could be found and the Government did not raise the defense of Section 2674. *Moran* v. *United States*, 102 F. Supp. 275 (D. Conn.), held that a suit could be maintained under the Federal Tort Claims Act for death on the high seas.

In *Somerset Seafood*, the Fourth Circuit rejected the contention that the Tort Claims Act "was not intended to impose liability on the United States for damages arising out of what are essentially 'governmental' functions as distinguished from those which might be carried on by private individuals" (193 F. 2d at 635). In doing so the court thrust to one side this Court's views to the contrary in *Feres*, 340 U. S. at 141, and, instead relied upon and quoted an earlier district court opinion, *Cerri* v. *United States*, 80 F. Supp. 831, 833, which pre-dated *Feres*. This portion of the *Somerset Seafood* decision was expressly urged upon this Court in the *Dalehite* case by petitioner Pan-American Refining Corporation, et al. (Br. pp. 232–237). The problem was discussed by the Government in its brief in *Dalehite*, No. 308, Oct. Term, 1952, pp. 171–184, 203–212. We believe that this Court repudiated the above-quoted remark in *Somerset Seafood* when the *Dalehite* opinion concluded that the Tort Claims Act does not subject the United States to liability "arising from acts of a governmental nature or function" (346 U. S. at 28; and see *id.*, at 32), and when it reiterated the *Feres* holding that unless there is analogous private liability in like circumstances, the claim is barred under the Act (346 U. S. at 43–44). Therefore, insofar as *Somerset Seafood* and *Cerri* hold that the Act does embrace claims for the non-functioning of a purely govern-

mental activity, they are in direct conflict with both *Dalehite* and *Feres*, and to that extent are no longer of any precedential value.[34]

That is equally true of the passage from the *Mid-Central Fish Co.* opinion which petitioners quote (Pet. Br. pp. 9–10), for there the district judge was using the *Somerset Seafood* and *Cerri* cases as his authority. *Mid-Central Fish Co.* was heard on appeal after the decision in *Dalehite;* significantly, the Eighth Circuit rejected petitioners' view. *National Manufacturing Co.* v. *United States*, 210 F. 2d 263, 277–278, certiorari denied, 347 U. S. 967.[35]

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[34] In *Somerset Seafood*, plaintiff sued for damages for the sinking of its ship allegedly resulting from the Coast Guard's negligent marking of a wrecked vessel. The United States was the original owner of the wrecked vessel. It had itself created the dangerous condition in the waters. The initial duty of removing or marking a wrecked vessel rests upon the owner until abandonment of the vessel. After abandonment, the duty devolves upon the Coast Guard, under the Wreck Acts. 33 U. S. C. 409; 14 U. S. C. 86. Thus, while we think that *Somerset Seafood* was incorrectly decided, it is arguable that the decision is distinguishable on its facts in that the liability there imposed upon the United States had an analogous private counterpart.

[35] One reason given by the courts in *Somerset Seafood* (193 F. 2d at 635) and *Mid-Central Fish Co.* (112 F. Supp. at 795) for refusing to accept the contention that claims arising from the performance of a governmental function are not cognizable under the Tort Claims Act was that the distinction between governmental and proprietary activities has been held, in non-Tort Claims Act cases, not applicable to the Federal Government. Cf. *Federal Crop Ins. Corp.* v. *Merrill*, 332 U. S. 380, 383. But our contention with refer-

B. THERE IS NO ANALOGOUS PRIVATE LIABILITY IN LIKE CIRCUMSTANCES

Measured by the standards we have just discussed (*supra*, pp. 16–37), petitioners can have no claim under the Tort Claims Act. As we have already shown, the construction, maintenance and operation of lighthouses and of other general navigational aids are functions which, from the earliest days of our country, have been performed by the Federal Government (*supra*, pp. 11–16). More than that, for almost half a century, Congress has expressly prohibited any private person or other public body from undertaking this function except for very limited private purposes (*supra*, fn. 8 at p. 14). Where the activity which itself causes the damage is peculiarly governmental and prohibited to private persons, it is

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ence to Section 2674 is not based on this dichotomy so familiar and often so confusing in the area of a municipal corporation's liability for tort. See 37 Am. Jur. pp. 727–730; 38 *id.*, pp. 261 *et seq.* On the contrary, we have always recognized that, to cite one example, the Act applies to the negligent operation of a government vehicle irrespective of whether that vehicle was being employed in connection with a "governmental" or a so-called "proprietary" function. What we have urged, instead, is that Section 2674 prohibits the imposition of liability for the assertedly negligent performance of the governmental function *itself*. As we indicate below (p. 39), it is doubtful that Section 2674, which restricts the liability of the United States to that of a *private* individual, permits any comparison with municipal liability. Even making the comparison, however, we need not and do not adopt the "governmental-proprietary" distinction. See *supra*, pp. 21–22; *infra*, fn. 36, pp. 39–40.

especially difficult to perceive how there can be any analogous liability of a private person in like circumstances.

Since lighthouses and other navigational aids are established and maintained to afford safety in navigation and to prevent collisions and wrecks of vessels (14 U. S. C. 81), perhaps the closest analogy is supplied by the activities of a city or state in enacting and executing laws and ordinances intended to secure the safety, health, and well-being of the community. It must be remembered, however, that the only liability assumed by the United States under the Tort Claims Act is that of a "*private* individual" (28 U. S. C. 2674) or "*private* person" (28 U. S. C. 1346 (b)). These words leave little room for measuring the liability by that of a municipality or state or any other entity exercising governmental authority. Nevertheless, even if we indulge in the comparison and ignore the important adjective "private", treating "private individual" as including a city or state (see *Feres*, 340 U. S. at 142), the conclusion is one of no liability.[36]

[36] For purposes of Section 2674, it is not necessary to examine the reasons why a private person would not be liable in like circumstances; the fact that there is no liability is enough in itself. Since no private person engages in the kind of activity involved in this particular case, we are turning to the closest analogy available, that provided by similar activities of cities and states. We show below that no recovery is permitted against them in like circumstances. This bars petitioners' claims under Section 2674. Since one of

1. ***States and municipalities are not liable for the negligent performance of comparable activi-***

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the primary reasons why cities and states are not liable is because the activities are held to be "governmental" or "discretionary", the instant case may also be brought within the Section 2680 (a) branch of the governmental-function exclusion as well. See fn. 25, *supra* at p. 26.

As we have noted (*id.*), the "discretionary function" concept of Section 2680 (a) is in some part derived from principles developed in suits against states and municipalities for injuries flowing from the performance of what are regarded as "discretionary" or "governmental" functions. In that connection, the distinction we make (as already noted) is not between the "governmental" and "proprietary" functions of a municipal corporation, but, if a comparison is to be made, between its "discretionary" and its "ministerial" functions. Though sometimes confused, these two sets of opposites are separate and distinct and rest on different bases. In some states, the rule of non-liability for "discretionary" functions of municipalities originally developed, in part, as an offshoot of the court's application of the state's sovereign immunity from suit to non-"proprietary" functions of the city as a governmental arm of the state. But, as it has developed throughout the country, the rule of non-liability for "discretionary" functions has broken away from dependence on the state's immunity from suit, as well as from the governmental-proprietary distinction, and now rests firmly on the judgment that it is unwise, in the absence of specific legislation, to hold municipalities liable to respond in damages to private persons for acts or omissions connected with functions truly involving governmental discretion or judgment. That this is now the foundation of the rule is shown by the course of decisions in the State of New York which has long had a general statute subjecting the state to suit in tort. See *Barrett* v. *State of New York*, 220 N. Y. 423; *Paige* v. *State of New York*, 269 N. Y. 352; *Goldstein* v. *New York*, 281 N. Y. 396; *Steitz* v. *City of Beacon*, 295 N. Y. 51; *Murrain* v. *Wilson Line*, 270 App. Div. 372, affirmed, 296 N. Y. 845; *Newiadony* v. *State*, 276 App. Div. 59.

ties.—Because municipalities and states do not maintain navigational aids for the public benefit, as they do police and fire departments and militias, there never has been the opportunity to assert private actionable rights precisely like those petitioners assert here.[37] There is, however, an abundance of case law reflecting an almost universal rule of American governmental liability law that, absent specific legislative mandate, the negligent performance of, or the negligent

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[37] There has been a similar lack of opportunity in Great Britain but for a different reason. There the management of lighthouses and other navigational aids has been for several centuries vested in semi-public lighthouse authorities, the principal one being the Trinity House Corporation. Prior to 1854, these authorities were subsidized in large measure by pilotage, primage, and buoyage fees which were paid directly to them. And since that date, the servicing of navigational aids has been financed by light dues paid in to the Mercantile Marine Fund and the General Lighthouse Fund. These light dues, which are owing from all non-Crown ships plying English waters, are assessed either on a voyage basis or by way of periodic payment. See Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104) §§ 387, 417, 420; Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60) §§ 634, 635, 636, 638, 643, 648, 676 (1) (i); Merchant Shipping (Mercantile Marine Fund) Act, 1898 (61 & 62 Vict. c. 44) §§ 1, 5 (1); *Gilbert* v. *Corporation of Trinity House*, 17 Q. B. D. 795 (1886).

We know of no English case holding a lighthouse authority liable for the failure of a navigational aid to function properly. Cf. *Sheppard* v. *Glossop Corporation*, [1921] 3 K. B. 132. But even if there were decisions to this effect, they would have no bearing here since the Coast Guard does not receive payment from mariners using its facilities. As already seen, the Coast Guard, as an arm of the Government, maintains these aids as part of its general public duty.

failure to perform, governmental duties relating to the protection, safety and health of the community gives rise to no private actionable claim. The enactment of laws designed to accomplish such purposes and the duty of their execution are the primary kind of functions for which a government exists. The appropriate public officials are endowed with power to select the ways and means for performing these functions, and significant elements in the exercise of their judgment are public considerations different from those weighed by private persons. Accordingly, these functions are traditionally and universally regarded as "governmental" or as "discretionary." *Dalehite*, 346 U. S. at 43.

a. In the first place, whether or not a governing body will undertake specific activities for the purpose of protecting life and property is entirely discretionary. If it does undertake to secure these benefits for the public at large, the extent of the undertaking and the particular form it takes are not subject to judicial review because these duties are legislative in nature. *Ibid.*; *Weightman* v. *Corporation of Washington*, 1 Black 39, 49. Accordingly, a city or state cannot be held for failure to enact laws or ordinances which would have prevented injury if they had been passed and enforced.[38]

[38] See, *e. g.*, *Gutowski* v. *Mayor, etc. of City of Baltimore*, 127 Md. 502 (failure to set up inspection system which might have prevented explosion in Baltimore harbor); *Zywicki* v.

Similarly, it is regularly held that a governing body is not liable for the failure to enforce laws and ordinances which have been enacted for the purposes of safety and health.[39]

Jos. R. Foard Co., 206 Fed. 975 (D. Md.) (the same); *State* v. *General Stevedoring Co.*, 213 Fed. 51 (D. Md.), affirmed, 219 Fed. 827 (C. A. 4) (the same); *Mayne* v. *Curtis*, 73 Ind. App. 640 (failure to require bumper or derail at end of locomotive track); *Curran* v. *Chicago Gt. Western Ry. Co.*, 134 Minn. 392 (failure to require railroad gate crossings); *McGuinness* v. *Allison Realty Co.*, 46 Misc. 8, affirmed, 111 App. Div. 926 (failure to enact proper building code); *Smith* v. *Selinsgrove Borough*, 199 Pa. 615 (failure to prohibit dogs running at large); *Kelley* v. *City of Milwaukee*, 18 Wis. 83 (same for hogs); *Marth* v. *City of Kingfisher*, 22 Okla. 602 (same for horse racing on streets); *Kisther* v. *Indianapolis*, 100 Ind. 210 (failure to regulate railway running on street); *James* v. *City of Harrodsburg*, 85 Ky. 191 (failure to adopt ordinance on blasting).

[39] See, *e. g.*, *Restatement of Torts*, Sec. 288; *Kebert* v. *Board of Wilson County Com'rs*, 134 Kans. 401 (failure to appoint plumbing inspector); *Rusk* v. *Montgomery*, 89 Oreg. 93 (failure to supervise maintenance of wharf); *Kritchmar* v. *City of Atchison*, 133 Kans. 198 (failure to enforce anti-firecracker ordinance); *Remy* v. *City of Shenandoah*, 184 Iowa 1370 (same); *Salmon* v. *Kansas City*, 241 Mo. 14 (failure to enforce ordinance requiring license for blasting); *Hines* v. *City of Charlotte*, 72 Mich. 278 (failure to enforce zoning ordinance); *Harman* v. *City of St. Louis*, 137 Mo. 494 (same); *Ryan* v. *Kansas City*, 232 Mo. 471 (failure to enforce ordinance requiring lights and barriers around excavations); *City of Knoxville* v. *Hargis*, 184 Tenn. 262 (failure to enforce awning height ordinance); *Addington* v. *Town of Littleton*, 50 Colo. 623; *Town of Gainesboro* v. *Gore*, 131 Tenn. 35; *Everly* v. *City of Gas*, 95 Kans. 305 (all involving animals running at large contrary to ordinance); *City of Mansfield* v. *Brister*, 76 Ohio St. 270 (anti-sewage dumping ordinance); *Verguth* v. *City of Denver*, 19 Colo. App. 473 (ordinance against dumping ashes in unsafe place).

Finally, the negligent performance, or the failure to perform, by officers of the government of public duties relating to the protection of life and property imposes no liability upon the governing body.[40]

b. These principles apply specifically to state and municipal activities intended to secure safety

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[40] *E. g.*, *Turner* v. *United States*, 248 U. S. 354 (failure to prevent destruction of property); *South* v. *State of Maryland*, 18 How. 396 (failure to preserve the peace); *Giordano* v. *City of Asbury Park*, 91 F. 2d 455 (C. A. 3), certiorari denied, 302 U. S. 745, 799 (false arrest); *The Nez Perce Tribe of Indians* v. *United States*, 95 C. Cls. 1, 9–11, certiorari denied, 316 U. S. 686 (failure to prevent removal of gold from tribal land); *City of New Orleans* v. *Abbagnato*, 62 Fed. 240 (C. A. 5) (failure to prevent a lynching); *Gianfortone* v. *City of New Orleans*, 61 Fed. 64 (C. C. E. D. La.) (same); *Steitz* v. *City of Beacon*, 295 N. Y. 51 (negligent fire protection); *Murrain* v. *Wilson Line*, 270 App. Div. 372, affirmed, 296 N. Y. 845 (negligence in controlling a crowd); *Young* v. *State of New York*, 278 App. Div. 997, affirmed, 304 N. Y. 677 (failure to inspect a bridge scaffolding); *Meadows* v. *Village of Mineola*, 190 Misc. 815, 72 N. Y. S. 2d 368 (negligent enforcement of building code); *Schuster* v. *City of New York*, 121 N. Y. S. 2d 735 (failure to provide police protection after notice of threats on life); *Wynkoop* v. *Mayor and City Council*, 159 Md. 194 (same); *Brogan* v. *Philadelphia*, 346 Pa. 208 (failure to protect a traveler on the highways); *Savage* v. *District of Columbia*, 52 A. 2d 120 (D. C. Mun. App.) (negligent police protection); *Annala* v. *McLeod*, 122 Mont. 498 (same); *Borough of Norristown* v. *Fitzpatrick*, 94 Pa. 121 (failure to halt firing of a cannon in street); *O'Rourke* v. *Sioux Falls*, 4 S. D. 47 (same); *Trower* v. *City of Louisiana*, 198 Mo. App. 352 (same); *Rhodes* v. *Kansas*, 167 Kan. 719 (failure to extinguish a fire); *Fisher* v. *City of Boston*, 104 Mass. 87 (same). And see, *United States* v. *Price*, 95 F. 2d 687 (C. A. 5), certiorari denied, 305 U. S. 601 (negligent inspection of infected animals).

on the highways, activities which are not unlike those of the United States in establishing navigational aids for safety at sea. The cases are numerous. There is, for instance, no liability for negligence in the enforcement of a one-way street ordinance[41] or a parking ordinance,[42] for failure to prevent automobile or horse racing on the streets,[43] for omission to stop bicycle riding on the sidewalks,[44] for failure to regulate a railway running on a street,[45] for allowing a street car to operate the wrong way on a one-way street,[46] for not enforcing regulations prohibiting or limiting vehicles on sidewalks.[47]

Because it is acting in a uniquely governmental capacity, the negligent failure of a city to maintain traffic guide lines, lights, warning signs, or other marks and signals necessary for the safe and orderly flow of traffic does not create actionable private claims. Thus, there is no liability for the failure to maintain or erect stop signs.

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[41] *Doughty* v. *Phila. Rapid Transit Co.*, 321 Pa. 136.

[42] *White* v. *Casper*, 35 Wyo. 371; *Means* v. *Barnesville*, 28 Ga. App. 671; *Bradley* v. *Oskaloosa*, 193 Iowa 1072.

[43] *McCarthy* v. *Munising*, 136 Mich. 622; *Rose* v. *City of Gypsum*, 104 Kan. 412.

[44] *Jones* v. *Williamsburg*, 97 Va. 722; *Rogers* v. *City of Binghamton*, 101 App. Div. 352, affirmed, 186 N. Y. 595.

[45] *Kistner* v. *Indianapolis*, 100 Ind. 210.

[46] *Doughty* v. *Phila. Rapid Transit Co.*, 321 Pa. 136.

[47] *Roberson* v. *District of Columbia*, 86 A. 2d 536 (D. C. Mun. App.); *Tarbutton* v. *Town of Tennville*, 110 Ga. 90; *Rogers* v. *City of Binghamton*, *supra*; *Millett* v. *City of Princeton*, 167 Ind. 582; *Jones* v. *City of Williamsburg*, 97 Va. 722.

Kirk v. *City of Muskogee*, 183 Okla. 536; *Tolliver* v. *Newark*, 145 Ohio St. 517; *Powell* v. *Nashville*, 167 Tenn. 334. Nor for permitting traffic buttons, markers, or signs to become obliterated and difficult to see (*Blackburn* v. *City of St. Louis*, 343 Mo. 301; *Prewitt* v. *City of St. Joseph*, 334 Mo. 1228), for the negligent maintenance of safety zone marks (*City of Denver* v. *Forster*, 89 Colo. 246), or for the failure to light streets or sidewalks (*Wolff* v. *District of Columbia*, 196 U. S. 152). See also, *Sheppard* v. *Glossop Corporation*, [1921] 3 K. B. 132. Making a highway safe for travel is the exercise of a "governmental power". *Clain* v. *City of Burlington*, 202 F. 2d 532, 534 (C. A. 2) (per L. Hand, C. J., denying recovery against a city for its negligent failure to light up a "silent policeman"). In *Corruthers* v. *City of St. Louis*, 341 Mo. 1073, the plaintiff sustained injuries when his auto climbed a curb. He had been following a traffic guide line which, instead of marking the middle of the road, led to the curb. His claim for damages, based upon the city's negligence in failing properly to maintain the line and to have adequate lights or other warning of the curb, was rejected on the ground that the regulation of traffic is a governmental function.

The same rule applies when cities are sued for the negligent misdirection of traffic on the public highways. In *Ferrier* v. *City of White Plains*,

262 App. Div. 94, leave to appeal denied, 287 N. Y. 852, recovery was denied where the injuries resulted from a driver's compliance with a traffic policeman's signal to proceed into an intersection.[48]

Actions have frequently been brought against cities because of a collision caused by negligent maintenance of automatic traffic signals, *e. g.*, lights in both directions showing green at the same time, or one side green and the other failing to show red. Here, too, by the overwhelming weight of authority, the city is held free of liability because the activity involved is a governmental function. See *e. g. Dorminey* v. *Montgomery*, 232 Ala. 47; *Avey* v. *West Palm Beach*, 152 Fla. 717; *Sandmann* v. *Sheehan*, 279 Ky. 614; *Edwards* v. *City of Shreveport*, 66 So. 2d 373 (La. Ct. App.); *Auslander* v. *St. Louis*, 332 Mo. 145; *Vickers* v. *Camden*, 122 N. J. L. 14; *Hodges* v. *City of Charlotte*, 214 N. C. 737; *Kirk* v. *City*

[48] This decision as well as the other New York cases cited in fns. 36 and 40, *supra*, pp. 40 and 44, are of especial significance because they arise under a New York statute (L. 1929, ch. 467; L. 1939, ch. 860, sec. 8) which waives the State's sovereign immunity in much broader terms than does the Federal Tort Claims Act. It contains no governmental-function exception analogous to 28 U. S. C. 2680 (a). Nevertheless, even without such an express exception, the New York courts hold that the State and its cities are not liable for the negligent performance of a governmental or discretionary function. *Ferrier* case, *supra*, and see *Barrett* v. *State of New York*, 220 N. Y. 423, 430–431; *Goldstein* v. *State of New York*, 281 N. Y. 396, 405, 406.

of Muskogee, 183 Okla. 536; *Martin* v. *Canton*, 41 Ohio App. 420; *Baker* v. *Waco*, 129 S. W. 2d 499 (Civ. App. Tex.).[49]

The basis for this rule is well stated in *Dorminey* v. *Montgomery*, *supra*, the leading case. Suit was instituted against the City of Montgomery for damages allegedly flowing from the failure of a traffic signal to operate. In holding that the

[49] The only cases *contra* we have found are the two on which petitioners rely, *Johnston* v. *City of East Moline*, 405 Ill. 460, and *Foley* v. *New York*, 294 N. Y. 275. In *Johnston*, the court held that the operation of traffic signals is not a governmental function. And in the *Foley* case, liability was imposed upon the state for the negligent maintenance of a traffic signal on the ground that the New York Vehicle and Traffic Law imposed a *mandatory* duty to maintain the signal. That no such mandatory duty has been imposed upon the Coast Guard in regard to navigational aids is clear. In the first place, 14 U. S. C. 81 provides that the Coast Guard "*may* establish, maintain, and operate" navigational aids (emphasis added). Secondly, this Court determined in the *Dalehite* case that Coast Guard activities are not performed pursuant to a mandatory duty, the violation of which may give rise to a cause of action in tort. 346 U. S. at 43–44. In discussing the Coast Guard, the Court cited *Steitz* v. *City of Beacon*, 295 N. Y. 51. In *Steitz*, the New York court emphasized that its earlier *Foley* decision rested on the legislative intent to protect the personal interests of particular individuals. In *Steitz*, where the statute was not mandatory, the city was empowered to maintain a fire department and to operate a system of waterworks for fire protection. The negligent failure to do so was held not actionable by a private person who suffered fire damage because the statute was not designed "to protect the personal interest of any individual" except as they were "members of the community" (295 N. Y. at 55). We believe this reasoning is equally applicable here. See also *infra*, pp. 52–58.

complaint, which was grounded on a theory of negligence, failed to state a cause of action, the Supreme Court of Alabama said (232 Ala. at 49):

> Traffic signal lights serve the purpose, and were so designed, to regulate the use of the streets, where installed. There is no duty enjoined by statute upon a municipality to install such signals, and, if installed, it is done in the exercise of a discretionary power, possessed by the municipality to conserve the safety of the public using such streets. * * *
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> * * * The whole theory of plaintiff's case is predicated upon the theory of a duty owing the plaintiff by the city to maintain the signal lights in proper repair and working condition, in view of the fact that they had been installed, and had theretofore controlled the public making use of said streets, and upon which plaintiff relied to her injury.
>
> Nevertheless, we are of the opinion that the city, in installing the signal lights to warn and direct the traveling public, was exercising a governmental function, under its police power, and, this being true, * * * was not answerable in damages to the plaintiff for any failure of the city, its agents, employees, or officers in permitting the traffic light to be or to remain out of repair.

Compare *German Alliance Ins. Co.* v. *Home Water Co.*, 226 U. S. 220, 227–228, where this Court said:

> [T]he city was under no legal obligation to furnish [water for fire protection]; and . . . voluntarily under-

c. We are justified in relying upon this group of cases, even though they may come from states without tort claims legislation, because the federal Act preserves the same immunity for federal governmental functions as these states have retained for themselves and their municipalities. See *supra*, pp. 17 *ff*. Moreover, as we have shown in fns. 25 and 36 *supra*, pp. 26, 40, and as the text of the opinions reveal, these state decisions rest on considerations of public policy which are equally applicable to the Federal Government and were recognized by Congress in enacting the Tort Claims Act. If the rule were not as this mass of cases settles it to be, the governing body would in effect be a guarantor of the perfect execution of its laws, and negligence in the performance of its governmental duties relating to the safety, health and welfare of the community would be actionable by anyone injured. "An intention to impose * * * the crushing burden of such an obligation should not be imputed to the Legislature in the absence of language clearly designed to have that effect." *Steitz* v. *City of Beacon*, *supra*, 295 N. Y. at 55. Cf. *Routh* v. *Quinn*, 20 Cal. 2d 488; *Young* v. *State*, 278 App. Div. 997, affirmed, 304 N. Y. 677. The recent decision of this

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took to do more than the law required, it did not thereby subject itself to a new or greater liability. It acted in a governmental capacity, and was no more responsible for failure in that respect than it would have been for failure to furnish adequate police protection.

Court in *United States* v. *Gilman*, 347 U. S. 507, 510–513, underscores this reasoning. The Court there observed that, "The financial burden placed on the United States by the Tort Claims Act * * * raises important questions of fiscal policy." Recovery was denied in that case on a claim which, even though it was a product of the Tort Act itself, raised questions affecting fiscal policy and other internal relationships which Congress had left unanswered. As to these matters, the Court concluded, Congress alone should formulate the policy. Similarly here, to impose liability for the failure of a governmental activity to achieve its purpose suggests implications of vast proportions, financially as well as internally.[51] We think that Congress has unequiv-

[51] A claim of this kind, if actionable, opens the door to judicial inquiry into the internal operation of the whole complex of governmental activity. Thus, where the claim is based upon alleged negligence in the failure to maintain a general navigational aid, the complaint might present issues as to whether the Coast Guard was derelict in the type of equipment or device used, or in permitting a specific light to be unwatched, or in the nature and frequency of its inspection of the light, or in assigning particular personnel to a certain kind of duty, etc. Petitioners cite no authorities for permitting such inquiry into the internal management of the executive functions of government.

In this connection, we should point out that, at least as to the second and third charge of negligence levelled against the Coast Guard by petitioners (*supra*, pp. 5–6), it is possible to apply the "discretionary function" exception of Section 2680 (a); in the sense in which it was applied to the manufacture of FGAN in *Dalehite*. See *supra*, pp. 28–29. The

orally indicated a denial of this type of liability. But if it has not, then a decision of such import should await the specific expression of legislative policy.[52]

2. *If a duty at all, the obligation to maintain a lighthouse is owed to the public and a breach does not create private rights.*—a. Another formulation for the result reached in the cases we have discussed (*supra*, pp. 40 *ff.*), equally applicable as a bar to recovery in the instant action, is that the obligation is one which is owed to the public in general and not to particular individuals. Many statutes, particularly those which exercise police power, create uniform standards of conduct or duties which must be met by private persons. Breach of such statutory duties by a private person and the consequent injury to those intended to be protected will generally result in an actionable cause.[53] But the failure of a government to ful-

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Coast Guard had to exercise administrative discretion as to the frequency of its inspection of navigational aids, and also as to the steps, if any, which it should take to notify vessels that a light is not functioning.

[52] Cf. *Dalehite*, 346 U. S. at 31: "[O]ur decisions have interpreted the Act to require *clear relinquishment* of sovereign immunity to give jurisdiction for tort actions" [emphasis added].

[53] *E. g.*, *Texas and Pac. R. Co.* v. *Rigsby*, 241 U. S. 33. But even here, the initial test is to determine whether the "statute gives a cause of action to a person injured by its violation, or whether it is intended as a general police regulation, and the violation made punishable solely as a public offense." *Amberg* v. *Kinley*, 214 N. Y. 531, 535-6. "The nature of the duty * * * and the benefits to be accomplished through its

fill its statutory undertakings to preserve the health and security of the community poses a distinct problem. The duties involved are public in nature and their violation normally does not create private rights. Cf. *German Alliance Ins. Co.* v. *Home Water Co.*, 226 U. S. 220, 227–228 (fn. 50, *supra*, p. 49); *Turner* v. *United States*, 248 U. S. 354, 358. In the absence of a clearly expressed contrary purpose, statutes and ordinances which undertake, through governmental action, to protect life and property "do not import intention to protect the interests of any individual except as they secure to all members of the community the enjoyment of rights and privileges to which they are entitled only as members of the public." *Steitz* v. *City of Beacon*, 295 N. Y. 51, 56; cf. *Moch Co.* v. *Rensselaer Water Co.*, 247 N. Y. 160, 168. Where such statutes impose a specific duty upon a public official, his failure to perform or his negligent performance of his duty is regarded as a public injury, not a private wrong; a breach of such a public duty is punishable by some form of public prosecution, but not by way of a civil action by those who have suffered damage in

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performance, must generally determine whether it is a duty to the public in part or exclusively, or whether individuals may claim that it is a duty wholly or in part for their especial benefit." *Hayes* v. *Michigan Central R. R. Co.*, 111 U. S. 228, 240. For example, a municipal ordinance requiring property owners to remove ice from sidewalks is generally held to create a duty to the public rather than to private individuals. *Taylor* v. *Lake Shore & Mich. S. Ry.*, 45 Mich. 74; *Restatement of Torts*, § 288, Comment a.

consequence of the default in duty. *South* v. *State of Maryland*, 18 How. 396, 402.[54]

This basis for immunity has been applied where the city or state has been sued for injury resulting from negligence in failing to provide adequate police protection,[55] fire protection,[56] and in other respects relating to safety and health.[57]

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[54] It has sometimes been suggested that, if the employee who committed the allegedly wrongful act can be held liable personally to the injured plaintiff, the United States must be similarly liable under the Tort Claims Act. In this case, there are two answers to that contention. First, there is no necessary equivalence between the liability of the employee and that of the United States. While the liability of the employee may be a condition precedent to that of the United States (for the Act is based upon a respondeat superior or derivative theory of liability, hence a defense available to the employee should be available to his employer, see *N. O. & N. E. R. Co.* v. *Jopes*, 142 U. S. 18, 24), it does not follow that the United States is liable whenever its employee is. For example, an employee committing an assault can be personally held, but the United States cannot be sued because 28 U. S. C. 2680 (h) excludes liability for wrongs of this kind. Second, it is highly doubtful that a Coast Guard employee engaged in maintenance of a lighthouse owes any duty to any particular private person, which can be enforced by a private suit for damages. Like the Government's obligation, his responsibility is to the public as a whole and he owes no defined duty to any specific individual or group of individuals.

[55] *South* v. *State of Maryland*, *supra*; *Annala* v. *McLeod*, 122 Mont. 498; *Murrain* v. *Wilson Line*, 270 App. Div. 372, 377, affirmed, 296 N. Y. 845.

[56] *Steitz* v. *City of Beacon*, *supra*.

[57] See, e. g., *United States* v. *Price*, 95 F. 2d 687 (C. A. 5), certiorari denied, 305 U. S. 601 (negligent inspection of infected animals); *Meadows* v. *Mineola*, 190 Misc. 815, 817, 72 N. Y. S 2d 368 (negligent enforcement of building code).

As Mr. Justice Brandeis pointed out over thirty years ago, in a case where the sovereign had waived immunity, the fundamental obstacle to recovery in such situations "is not the immunity of a sovereign to suit, but the lack of a substantive right to recover the damages resulting from failure of a government or its officers" to fulfill their duties efficiently; in short, the claimant had no substantive right to recover prior to the consent to suit and there can be no recovery after the waiver unless the Act clearly indicates a purpose to create a new substantive right. *Turner* v. *United States*, 248 U. S. 354, 358 (destruction of property through mob violence and failure to keep the peace).

The principle has been applied in cases under the Tort Act. *National Mfg. Co.* v. *United States*, 210 F. 2d 263 (C. A. 8), certiorari denied, 347 U. S. 967 (negligence of Weather Bureau does not create private rights); *Clark* v. *United States*, 109 F. Supp. 213 (D. Oreg.) (negligence of Army in maintaining dikes); *Lacey* v. *United States*, 98 F. Supp. 219, 220 (D. Mass.) (negligence of Coast Guard in effecting a rescue); and see *The P. Dougherty Co.* v. *United States*, 207 F. 2d 626 (C. A. 3), certiorari denied, 347 U. S. 912 (same, under the Public Vessels Act, 43 Stat. 1112, 46 U. S. C. 781 *et seq.*). For it is perfectly clear that the Tort Claims Act does not create any new substantive rights. *Dalehite* v. *United States*,

340 U. S. 15, 18; *Feres* v. *United States*, 340 U. S. 135, 142. And that there never was any legislative purpose to confer private actionable rights for the negligent maintenance of a lighthouse is obvious from the fact that the statutes through which the United States undertook that function were passed many years before Congress, by enactment of the Tort Claims Act, permitted suit for tort. E. g., Act of May 15, 1820, 3 Stat. 598; Act of June 23, 1874, 18 Stat. 204, 220.

b. Petitioners in this Court (Pet. Br. pp. 7–8), and much more pointedly in their brief below (pp. 15–16), argue that although the Coast Guard was under no obligation to establish and operate a lighthouse as a warning to mariners, once it voluntarily did so, knowing that vessels would rely upon it,[38] the Coast Guard was then under an *actionable* duty to exercise care to continue to maintain the light.[39] To accept this view would be to

[38] But note that the Light List apprised mariners that the Chandeleur Light was an unwatched light and that such lights "may become irregular or extinguished." See fn. 2, *supra* at p. 5.

[39] As between private parties, petitioners' argument received support in *Glanzer* v. *Shepard*, 233 N. Y. 236, 238, where a public weigher was held liable for negligence in weighing beans when he knew that the weight would determine the sales price. But in *Moch Co.* v. *Rensselaer Water Co.*, 247 N. Y. 160, 168, Judge Cardozo excluded the performance of public governmental duties from the scope of the *Glanzer* case. And in *Ultramares Corp.* v. *Touche*, 235 N. Y. 170, 183; he explained that the buyer was "in effect, if not in name, a party to the contract" of weighing.

impose liability on principles akin to those governing the liability of a Good Samaritan. See *Prosser on Torts* (1941), pp. 194–197. For the reasons already given (*supra*, pp. 52–56), the Good Samaritan doctrine can have no application to governmental activities. If it were adopted, virtually every governmental activity would fall within its reach, whether it be police protection, fire fighting, health regulation, traffic control, or any other activity undertaken to protect the safety and security of the citizenry. Such activities are always commenced by the Government voluntarily and with the knowledge and intention that the public will rely upon them. Their purpose, however, is to benefit the public at large, and it is not contemplated that private actionable rights will be created in the event of their negligent performance. Otherwise, the governing body would be held as a guarantor of their faultless execution. We repeat again the *Feres* and *Dalehite* admonition that the effect of the Tort Claims Act "is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities." 346 U. S. at 43.

This Good Samaritan argument was rejected in *National Manufacturing Co.* v. *United States*, 210 F. 2d 263, 278 (C. A. 8), certiorari denied, 347 U. S. 967; cf. *Jones* v. *United States*, 207 F. 2d 563 (C. A. 2), certiorari denied, 347 U. S. 921;

Elufera v. *Thomas*, 119 F. 2d 28 (C. A. 6). Its acceptance would necessarily collide with the Coast Guard portion of the *Dalehite* opinion (*supra*, pp. 30–32).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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ating the lighthouses.[4] Traditionally, and properly so, this has always been regarded as an exclusively governmental function. Its objective being to promote the welfare of the nation as a whole by preventing disasters at sea and, at the same time, to facilitate the nation's commerce, the activity involves a characteristically public duty, entirely unlike any borne by a private person. While a private person may have a

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[4] See our main brief, pp. 11–16. We referred there to the ninth statute enacted by Congress, the Act of August 7, 1789, 1 Stat. 53, under which the United States became responsible for the operational expenses of all existing lighthouses and other aids to navigation. While that Act carried a proviso that the expenses would not be paid after one year unless the navigational facility were ceded to the United States, later enactments provided for their payment even though a lighthouse had not been ceded, and extended the time of the states to make the cession. *E. g.*, 1 Stat. 137, 218, 251, 339, 393, 488.

The erection and maintenance of lighthouses has always been a governmental rather than a private function. The first lighthouse in America is said to be the one built by the Province of Massachusetts in 1716 at Boston Harbor. There were twelve lighthouses in existence when the present Federal Government was established. These had been built by the colonial governments during the period from 1716 to 1789, and, within a few years from the latter date, all were ceded to the Federal Government. George R. Putnam, *Lighthouses and Lightships of the United States* (1933), pp. 1–30; George Weiss, *The Light House Service* (*Brookings Institute, Service Monographs of the United States Government, No. 40*) (1926), pp. 1–3. The Coast Guard, whose files relating to this country's lighthouses reach back to 1837, advises us that they have no record of any privately operated lighthouse. In one or two instances, by special arrangement with the Coast Guard, a state has been authorized to maintain

duty to warn others of any hazard he has himself created and which foreseeably might endanger others (as when a private individual builds a bridge over a river, or a railroad crosses a public road), there is no duty imposed at common law which requires a private person to go upon a publicly travelled route and warn others of nature's perils, no less to take measures voluntarily which he thinks might promote safety in commerce. The maintenance of general navigational aids is a uniquely public function, closely akin to other public services carried on solely by government to promote the welfare of the community as a whole. If the function fails to achieve its objective, even though through negligence, no private right of action accrues.

More than 150 years ago, Congress was presented with a petition for private relief in a situation which is virtually identical to the one at bar. There were two small lighthouses at New-

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general navigational aids, as in the case of New York which maintains the aids on its canal system.

The importance of the activity as a function of the Federal Government, from its beginning, is evidenced by the fact that the first volume of the Statutes at Large is replete with enactments relating to the establishment and operation of lighthouses by the Federal Government, *e. g.*, 1 Stat. 53, 137, 184, 218, 246, 251, 339, 353, 368, 393, 418, 426, 452, 464, 488, 540, 553, 607. That Congress early recognized this to be an obligation of government, rather than of private individuals, is also reflected in an appropriation in 1802 "for the reimbursement of the merchants of Plymouth and Duxbury, for monies expended by them in erecting a temporary light on the Gurnet * * *." 2 Stat. 151.